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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|-----------------|-------------|----------------------|---------------------|------------------|
| 10/519,637 | 12/28/2004 | Rodney W. Tyler | 1030-018 | 9141 |

34060 7590 01/28/2008
MICHAEL N. HAYNES
1341 HUNTERSFIELD CLOSE
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| EXAMINER |
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SAFAVI, MICHAEL

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| ART UNIT | PAPER NUMBER |
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3637

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| MAIL DATE | DELIVERY MODE |
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01/28/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

| | | | |
|------------------------------|------------------------|---------------------|--|
| Office Action Summary | Application No. | Applicant(s) | |
| | 10/519,637 | TYLER, RODNEY W. | |
| | Examiner | Art Unit | |
| | M. Safavi | 3637 | |

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 26 October 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-119, 122-161, 163, 165-175 and 199 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 123-161, 163, 165-175 and 199 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date <u>10/26/07</u> . | 6) <input type="checkbox"/> Other: _____ |

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A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on October 26, 2007 has been entered.

Terminal Disclaimer

The terminal disclaimer filed on October 26, 2007 disclaiming the terminal portion of any patent granted on this application which would extend beyond the expiration date of 7,226,240 has been reviewed and is accepted. The terminal disclaimer has been recorded.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to

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be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 123-131, 136-161, 163, 165-175, and 199 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 29 and 30 of copending Application No. 11/879,316 in view of Brown '031. The invention defined by claims 29 and 30 of U.S. Patent No. 11/879,316 possesses the elements and features of instant claims 123-131, 136-161, 163, 165-175, and 199 with the exception of a first ratio of said first length to said first major diameter being greater than approximately 10 or 20 or 30 or 40. However, Brown teaches application of a tubular mesh enclosure defining a first length and a first major diameter with a first ratio of said first length to said first major diameter greater than approximately 40, (col. 3, line 62 to col. 4, line 1 as well as col. 3, lines 49-50). Therefore, to have provided the invention of claims 29 and 30 of U.S. Patent Application No. 11/879,316 with a ratio of said first length to said first major diameter greater than approximately 40, thus allowing for application to a greater area of use, would have been obvious to one having ordinary skill in the art at the time the invention was made as taught by Brown.

This is a provisional obviousness-type double patenting rejection.

Claims 132-135 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 29 and 30

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of copending Application No. 11/879,316 in view of Brown '031 as applied above and further in view of Houck et al. '123. The invention defined by claims 29 and 30 of U.S. Patent No. 11/879,316 as modified by Brown possesses the elements and features of instant claims 132-135 with the exception of "an irrigation hose surrounded by said filling". However, Houck et al. '123 teaches application of an irrigation hose surrounded by a filling within a mesh enclosure. Therefore, to have provided the invention of claims 29 and 30 of U.S. Patent Application No. 11/879,316 as modified by Brown with an irrigation hose surrounded by a filling within a mesh enclosure, thus allowing for a more streamline irrigation or drainage, would have been obvious to one having ordinary skill in the art at the time the invention was made as taught by Houck et al. '123.

This is a provisional obviousness-type double patenting rejection.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to M. Safavi whose telephone number is (571) 272-7046. The examiner can normally be reached on Mon.-Thur., 8:30-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Lanna Mai can be reached on (571) 272-6867. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.



M. Safavi
January 16, 2008

**MICHAEL SAFAVI
PRIMARY EXAMINER
ART UNIT 3637**